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October 26, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 12, 2004

Case No.: TIA-0136

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE.¹

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests

¹ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov.esa.

the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.²

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

B. Procedural Background

The Applicant was employed at DOE's Oak Ridge (Y-12) site. He worked at the site as a machinist and plant shift superintendent for nearly 35 years, from 1951 to 1986.

The Applicant filed an application with OWA, requesting physician panel review of three illnesses – colon cancer, coronary artery disease, and hip replacements. The Physician Panel rendered a negative determination on each of the claimed illnesses and explained the basis of each determination. The OWA accepted the Physician Panel's negative determination on each of the claimed illnesses.

The Applicant appeals the negative determination on each of the illnesses. For the colon cancer, two members of the Panel determined that the Applicant's occupational exposures were not sufficient to have caused, aggravated, or contributed to the illness. One member of the Panel determined that, given the Applicant's exposure to asbestos and metal working fluids and the length of the Applicant's period of employment, it was likely that occupational exposures caused the colon cancer. For the claimed coronary artery disease, the Panel determined that there was no evidence linking the illness to the Applicant's workplace exposures. For the claimed hip replacements, the Panel determined that there was no indication that the illness was caused by any specific workplace event.

The OWA accepted the Physician Panel's negative determination on each of the claimed illnesses. The Applicant filed the instant appeal.

² See www.eh.doe.gov/advocacy.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,³ applied the wrong standard,⁴ or failed to explain the basis of its determination.⁵ On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In his appeal, the Applicant maintains that the Panel's negative determination is incorrect. The Applicant advances several arguments which are considered below.

First, regarding his workplace exposures, the Applicant argues generally that radiation exposure records are often incomplete or unavailable. The Applicant maintains that he had access to the entire plant during his 35 years of employment at Y-12 and he was exposed to various hazardous and toxic substances, including asbestos and machining fluids, in the course of performing his duties. This argument does not provide a basis for finding panel error. The Panel examined each claimed illness, made a determination on each illness, and explained the basis of that determination. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment rather than an indication of panel error.

Second, regarding his hip replacements, the Applicant argues that the fact that the floors and steps at the Y-12 site are primarily concrete and that he made several trips daily around the buildings could have contributed to his need for hip replacements. Although the Panel addressed the claimed hip replacements, the Physician Panel Rule applies to a DOE contractor employee whose illness or death "arose out of and in the course of employment by a DOE contractor and through exposure to a toxic substance at a DOE facility." 10 C.F.R. § 852.1(4). A toxic substance is defined as "any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature." 10 C.F.R. § 852.2. The Applicant attributes his hip replacements to walking on concrete. Concrete is not a "toxic substance." Therefore, the Applicant's arguments

³Worker Appeal, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

⁴Worker Appeal, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

⁵Id.

relating to the hip replacement do not provide a basis for granting the appeal.

Lastly, the Applicant argues that the two members of the Panel who rendered a negative determination on his colon cancer are "doing what Congress said they would not do, make employees prove their claims." The Applicant's argument does not provide a basis for finding panel error. Under the Physician Panel Rule, a physician panel, after examining an individual employee's record, must make a determination as to whether the employee's illness arose through exposure to a toxic substance in the course of the employee's employment at a DOE facility. 10 C.F.R. § 852.1. In the instant case, the Panel examined each of the Applicant's claimed illnesses, made a determination on each illness, and explained the basis of that determination. Accordingly, the Applicant's argument does not provide a basis for finding panel error.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0136 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 26, 2004